BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Courts Below.

No opinion was rendered by the Court of Appeals or the Appellate Division. Special Term of the Supreme Court rendered a short memorandum opinion (R. 353), and the referee who passed on the cause in the first instance, rendered an opinion holding the judgment herein void (R. 314-325) which opinion is not otherwise reported.

II

Jurisdiction.

The judgment and amended remittitur of the Court of Appeals is dated, July 29, 1942 (R. 363, *et seq.*). It contains a recital that a question under the Federal Constitution was presented and passed upon by the Court in arriving at its decision.

Jurisdiction of this Court to entertain the petition is predicated upon Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

III

Statement of the Case.

This has already been set forth in the preceding petition under A (pp. 1-4).

IV

Questions Presented.

1. Whether the judgment secured by the Department of Banking, State of Nebraska, in the Courts of Nebraska, is entitled to be accorded full faith and credit by the New York Courts under the Federal Constitution.

V

Specifications of error.

The Court below erred in holding:

1. That the courts of the State of Nebraska had no jurisdiction over the National Surety Company.

2. That the requirement of Nebraska statutes as respects a foreign insurance company, that it submit to Nebraska jurisdiction as to liabilities there contracted notwithstanding the dissolution of the insurer in its chartering state, was entitled to no extraterritorial effect and furnished no basis for jurisdiction over the insurer after its dissolution.

VI

Summary of Argument.

Nebraska need not have admitted the National Surety Company to do business within its borders. It conditioned its admission to do business in the State by requiring it to submit to its jurisdiction so long as there were outstanding liabilities against it in the state. This we say, was a reasonable condition that Nebraska could exact from this foreign insurer for the protection of its citizens who did business with the company. New York, the chartering state of the insurer, asserts that Nebraska can only require the company to submit to its jurisdiction while it is a going

concern, and that its attempt by statute to continue to retain jurisdiction as to liabilities there contracted, after the dissolution of the company in the chartering state, is invalid. Our point is that the chartering state may not so limit Nebraska as respects subjecting a foreign insurer to its jurisdiction.

POINT I

The Nebraska statutes and the power of attorney filed by the Surety Company thereunder, furnished a sufficient basis upon which jurisdiction over the company could be predicated.

In August, 1913, the National Surety Company applied to the State of Nebraska for permission to transact the business of insurance in that state. Permission was granted pursuant to its statutes upon its filing a Power of Attorney with the Insurance Department of that State (Cl.'s Exh. 16, p. 242) whereby the Insurance Commissioner was appointed its statutory agent to receive process on its behalf. The Surety Company, by this instrument, further agreed, "that this authority shall continue in force so long as any liability remains outstanding against the Company in this State" (Cl.'s Exh. 16).

The requirement that a foreign insurer appoint an agent to receive process on its behalf, conforms to the prevailing practice throughout the country, whereby local citizens can enforce their claims on insurance policies in the local courts and not be compelled to seek the courts of the chartering state of such foreign insurer for the enforcement of such claims.

Mutual Reserve Life Assn. v. *Phelps,* 190 U. S. 147;
St. Clair v. *Cox,* 106 U. S. 350;
Wash. ex rel. Bond & G. T. Co. v. *Superior Ct.,* 289 U. S. 361.

Specifically, Nebraska intended to protect its citizens in the event of any claims arising on policies written by the National Surety Company in that State. It wanted the assurance that on such claims its citizens could sue the insurer in Nebraska and not be compelled to follow the company to New York. And so its Constitution and Statutory law were framed to effect that purpose (Cl.'s Exhs. 3, 4, 5, 17).

That the State of Nebraska had power to impose such conditions upon a foreign insurer as a requisite to doing business in that state admits of no doubt.

> *Mutual Reserve Life Assn.* v. *Phelps*, 190 U. S. 147, *supra;*
> *Comey* v. *United Surety Co.*, 217 N. Y. 268, 272-74.

That a foreign insurer cannot defeat this purpose by simply withdrawing from the State and ceasing to do business therein is likewise firmly established. And dissolution of a foreign insurer at its home state is equivalent to a withdrawal from the state.

> *Wash. ex rel. Bond & G. T.* v. *Superior Ct.*, 289 U. S. 361, *supra.*

The Courts below have taken the position that the common law rule as to the dissolution of a corporation prevails; that upon such dissolution of the corporation by the chartering state, the corporation ceases to exist for all purposes and hence Nebraska had and has no power in any way to modify the common law rule.

This view is set forth in the opinion of the referee below (R. 323) quoting from an opinion of the Court of Appeals in another case (*Matter of National Surety Co.*, 283 N. Y. 68), as follows:

> "When permission was granted to the National Surety Company by the State of Mississippi to do business in that State this did not change the fact that the State authorities were chargeable with knowledge of the statutes of the State of New York under which the National Surety Company was incorporated. This included knowledge that the State of its creation had the power to order its destruction and death. The statutes of a foreign jurisdiction can in no way modify, change or nullify the effectiveness of the dissolution of a corporation in the State of its incorporation * * *. Thus judgments entered against the dissolved corporation in a foreign jurisdiction are null and void in the state of its incorporation, and valid, if at all, only as to local assets found in the foreign jurisdiction."

This view of the law, we respectfully submit is erroneous. It denies the power of a state to impose any conditions respecting continuance of statutory agencies for service of process, since the argument suggests that the law of the chartering state controls everywhere the corporation may seek to do business.

The Nebraska Constitution (R. 60) provided:

> "Foreign corporations transacting or seeking to transact business in this state shall be subject, under general law, to regulation, supervision and general control, and shall not be given greater rights or privileges than are given domestic corporations of a similar character."

The National Surety Company, at the time it applied to Nebraska for permission to transact business is charged with knowledge of this provision and of the statutes enacted thereunder requiring it to file a power of attorney with the State Director of Insurance, and consequently must be deemed to have submitted to the jurisdiction of Nebraska.

If the view of the Court below is correct, then a resident of Nebraska who does business with a foreign in-

surer, may not rely on the prevailing law of Nebraska with respect to the regulation of such insurer, but would be charged with knowledge of the law of forty-seven different chartering states.

The opinion below suggests that the judgment herein, if valid at all, would be valid only as to the local assets of the company found in Nebraska. As applied to the situation at bar, this creates an anomalous situation.

First, the New York Liquidator, applied to the Nebraska Courts (after the commencement of the suit herein) to vacate a garnishee that a local creditor had levied on local assets of the company, and asserted that under the doctrine of *Clark* v. *Williard*, 292 U. S. 112, he was entitled to possession as well as legal title to all of the assets of the company wherever situated. Nebraska having committed herself to a public policy favoring a centralized liquidation of an interstate insurer, remitted the local assets of the company to the Domiciliary Liquidator in New York (R. 23).

> *State, ex rel. Sorensen* v. *State Bank of Omaha*, 136 Neb. 880.

It obviously must have relied on the fact that it retained jurisdiction to pass on the merits of claims of its citizens, since it plainly relinquished all control over the property of the insurer, and hence no interference with the control or possession of the New York Liquidator can be involved.

The contention of the domiciliary liquidator that New York is the exclusive jurisdiction for the determination of the validity of claims against an insolvent interstate insurer cannot be sustained under the authority of

> *Fischer* v. *American United Ins. Co.*, 314 U. S. 549.

This is not a case where the domiciliary liquidator did not receive full notice and an opportunity to defend (cf. *Uniform Insurers Liquidation Statute*). Here the respondent, relying on a decision of a United States District Court (R. 125) chose to ignore the summons and complaint served upon him by the Nebraska Director of Insurance. And yet, while the action was pending in Nebraska, respondent appeared in Nebraska for the purpose of asking its courts to subordinate and remit the local assets of the company to his jurisdiction.

The respondent seems to treat, *Matter of National Surety Co.* (*Laughlin*), 283 N. Y. 68, cert. denied, 311 U. S. 707, as a decision of this Court, and suggests that it is authority *contra* to petitioner's view. A denial of a petition for a writ of certiorari is not, as this Court has on many occasions stated, equivalent to an affirmance of the decision sought to be reviewed, and the *Laughlin* case cannot be treated as authority of this Court.

> *Hamilton Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, 258;
> *Atlantic Coast Lines R. R. Co.* v. *Powe*, 283 U. S. 401.

Moreover, in the *Laughlin* case, Mississippi refused to subordinate or transmit local assets of the insurer to the domiciliary liquidator, but retained it for the benefit of local creditors, and thus there was in some degree an interference with the possession and control of the domiciliary liquidator.

If we may look to the line of cases relating to the jurisdiction of a state to impose a tax on the transfer of shares of stock in a corporation which is incorporated

under its laws, and where the decedent is not domiciled in that State (Cf. *State Tax Commission* v. *Aldrich,* 316 U. S. 174), then it should follow that Nebraska has at least as substantial a basis upon which it may sustain jurisdiction over the National Surety Company with respect to business there transacted.

Conclusion

This case, involves we think, competing claims of sister states as to the exercise of jurisdiction over an insurer which did a nation-wide business, and it is, we respectfully submit, an appropriate case for review and consideration by this Court.

Respectfully submitted,

WALTER R. JOHNSON,
Attorney General of the
State of Nebraska.

MORRIS AMCHAN,
HOWARD SAXTON,
of Counsel.